

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHAEL JOHNSON,)	
)	No. CV-09-3075-CI
Plaintiff,)	
)	ORDER GRANTING PLAINTIFF'S
v.)	MOTION FOR SUMMARY JUDGMENT
)	AND REMANDING FOR ADDITIONAL
MICHAEL J. ASTRUE, Commissioner)	PROCEEDINGS PURSUANT TO 42
of Social Security,)	U.S.C. § 405(g)
)	
Defendant.)	

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 19, 25.) Attorney D. James Tree represents Michael Johnson (Plaintiff); Special Assistant United States Attorney Richard A. Morris represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment, and remands the matter to the Commissioner for additional proceedings.

JURISDICTION

Plaintiff protectively filed for disability insurance benefits (DIB) on May 18, 2004, and Supplemental Security Income (SSI) on March 24, 2004. (Tr. 17.) He alleged disability due to coronary heart disease with an onset date of August 16, 2001. (Tr. 104.) Benefits were denied initially and on reconsideration. Plaintiff

1 timely requested a hearing before an administrative law judge (ALJ),
2 which was held before ALJ Richard Say on October December 12, 2007.
3 (Tr. 17, 519-42.) Plaintiff, who was represented by counsel, and
4 vocational expert William Wright (VE) testified. The ALJ denied
5 benefits on January 8, 2008, and the Appeals Council denied review.
6 (Tr. 7-9, 14-28.) The instant matter is before this court pursuant
7 to 42 U.S.C. § 405(g).

8 STANDARD OF REVIEW

9 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
10 court set out the standard of review:

11 A district court's order upholding the Commissioner's
12 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
13 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
14 Commissioner may be reversed only if it is not supported
15 by substantial evidence or if it is based on legal error.
16 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
17 Substantial evidence is defined as being more than a mere
18 scintilla, but less than a preponderance. *Id.* at 1098.
19 Put another way, substantial evidence is such relevant
20 evidence as a reasonable mind might accept as adequate to
21 support a conclusion. *Richardson v. Perales*, 402 U.S.
22 389, 401 (1971). If the evidence is susceptible to more
23 than one rational interpretation, the court may not
24 substitute its judgment for that of the Commissioner.
25 *Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of*
26 *Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

27 The ALJ is responsible for determining credibility,
28 resolving conflicts in medical testimony, and resolving
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
Cir. 1995). The ALJ's determinations of law are reviewed
de novo, although deference is owed to a reasonable
construction of the applicable statutes. *McNatt v. Apfel*,
201 F.3d 1084, 1087 (9th Cir. 2000).

It is the role of the trier of fact, not this court, to resolve
conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
supports more than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner. *Tackett*, 180

F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in weighing the evidence and making the decision. *Browner v. Secretary of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If there is substantial evidence to support the administrative findings, or if there is conflicting evidence that will support a finding of either disability or non-disability, the finding of the Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

SEQUENTIAL EVALUATION

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The

1 claimant bears the burden of proving that [s]he is
2 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.
3 1999). This requires the presentation of "complete and
4 detailed objective medical reports of h[is] condition from
5 licensed medical professionals." *Id.* (citing 20 C.F.R. §§
6 404.1512(a)-(b), 404.1513(d)).

7 The Commissioner has established a five-step sequential
8 evaluation process for determining whether a person is disabled. 20
9 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
10 137, 140-42 (1987). In steps one through four, the burden of proof
11 rests upon the claimant to establish a prima facie case of
12 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
13 920, 921 (9th Cir. 1971). This burden is met once a claimant
14 establishes that a physical or mental impairment prevents him from
15 engaging in his previous occupation. 20 C.F.R. §§ 404.1520(a),
16 416.920(a). At step five, the burden shifts to the Commissioner to
17 show that (1) the claimant can perform other substantial gainful
18 activity; and (2) a "significant number of jobs exist in the
19 national economy" which claimant can perform. 20 C.F.R. §§
20 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496,
21 1498 (9th Cir. 1984).

22 STATEMENT OF THE CASE

23 The facts of the case are set forth in detail in the transcript
24 of proceedings and are briefly summarized here. During the alleged
25 closed period of disability, Plaintiff was between 49 and 53 years
26 old, unmarried, and living with his ex-spouse and their children.
27 (Tr. 527, 536.) Plaintiff attended high school through the 12th
28 grade, obtained a high school equivalency degree, and attended truck
driving school. (Tr. 110.) He served in the military and has a

1 significant past work history as a long-haul truck driver. (Tr.
2 114, 317, 365.)

3 At the December 2007 hearing, Plaintiff testified that during
4 the alleged closed period he was unable to lift more than a gallon
5 of milk, could sit 30 minutes before he had to move around, could
6 stand 10 to 15 minutes before his legs would start shaking, and
7 could not walk more than a block or two during that period. (Tr.
8 529-30.) He reported he had three heart attacks in the summer of
9 2001, and stated at the hearing he still experienced chest pains,
10 which he was trying to control without medication. (Tr. 524-25.)
11 He also reported problems with migraine headaches and weakness
12 during the period at issue. (Tr. 527.) Plaintiff resumed work as
13 a truck driver in May 2005. (Tr. 523.)

14 **ADMINISTRATIVE DECISION**

15 ALJ Say first determined Plaintiff met the insured status
16 requirements through December 31, 2006. (Tr. 19.) At step one, he
17 found Plaintiff had not engaged in substantial gainful activity
18 between August 16, 2001, and May 1, 2005. (*Id.*) At step two, he
19 found Plaintiff had severe impairments of "coronary atherosclerosis,
20 depression, coronary artery disease and subjective complaints of
21 weakness and numbness in extremities." (*Id.*) The ALJ also found
22 Plaintiff's hypertension, Hepatitis C, and migraine headaches were
23 non-severe impairments as defined by the Commissioner. (Tr. 20.)
24 At step three, he found Plaintiff's impairments, alone and in
25 combination, did not meet or medically equal one of the listed
26 impairments in 20 C.F.R., Appendix 1, Subpart P, Regulations No. 4
27 (Listings). (*Id.*) The ALJ summarized Plaintiff's testimony and
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1 concluded his statements regarding the intensity and persistence of
2 his functional limitations were not entirely credible. (Tr. 22-23.)

3 At step four, ALJ Say determined Plaintiff had the residual
4 functional capacity (RFC) to perform light work between August 16,
5 2001, and May 1, 2005. (Tr. 21.) Specifically, he found Plaintiff
6 could lift or carry 20 pounds occasionally and 10 pounds frequently;
7 could sit for two hours, stand or walk for six hours in an eight
8 hour workday, occasionally stoop, crouch, crawl, balance, or climb
9 stairs and ramps, but should never climb ladders, ropes or
10 scaffolds. He should avoid concentrated exposure to hazards.
11 Regarding mental limitations, the ALJ found Plaintiff could
12 understand, remember, and carry out simple, routine tasks. He
13 suffered mild to moderate chronic pain, but was able to be attentive
14 and responsive at work and carry out normal work assignments. The
15 ALJ noted medication was taken for symptoms, but the side effects
16 did not prevent Plaintiff from functioning adequately in the work
17 setting. (Tr. 21.) Based on this RFC and VE testimony, the ALJ
18 determined Plaintiff could not perform his past work as a truck
19 driver during the closed period. (Tr. 26.)

20 Proceeding to step five, and considering additional VE
21 testimony, the ALJ found there were jobs in the national economy
22 Plaintiff could have performed, such as truck dispatcher, small
23 parts assembler and telephone solicitor. He concluded Plaintiff was
24 not disabled during the closed period and, therefore, was ineligible
25 for Social Security benefits. (Tr. 26-27.)

26 ISSUES

27 The question is whether the ALJ's decision is supported by
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1 substantial evidence and free of legal error. Plaintiff argues the
2 ALJ erred when he: (1) improperly rejected the opinions of treating
3 and examining medical sources; (2) failed to give legally sufficient
4 reasons for discounting his testimony and the testimony of his ex-
5 spouse and daughter; and (3) failed to meet the Commissioner's
6 burden at step five. (Ct. Rec. 20.)

7 DISCUSSION

8 A. Credibility

9 When the ALJ finds a claimant's statements as to the severity
10 of impairments, pain, and functional limitations are not credible,
11 the ALJ must make a credibility determination with findings
12 sufficiently specific to permit the court to conclude the ALJ did
13 not arbitrarily discredit claimant's allegations. *Thomas v.*
14 *Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*,
15 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc). It is well-settled,
16 however, that an ALJ cannot be required to believe every allegation
17 of disabling pain, even when medical evidence exists that a
18 claimant's condition may produce pain. "Many medical conditions
19 produce pain not severe enough to preclude gainful employment."
20 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Although an
21 adjudicator may not reject a claimant's extreme symptom complaints
22 solely on a lack of objective medical evidence, medical evidence is
23 a relevant factor to consider. *Social Security Ruling (SSR) 96-7p.*¹

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25 ¹ Social Security Rulings are issued to clarify the Regulations
26 and policy. They are not published in the federal register and do
27 not have the force of law. However, under the case law, deference
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1 If there is no affirmative evidence that the claimant is
2 malingering, the ALJ must provide "clear and convincing" reasons for
3 rejecting the claimant's symptom testimony. *Reddick v. Chater*, 157
4 F.3d 715, 722 (9th Cir. 1998). The ALJ engages in a two-step
5 analysis in deciding whether to admit a claimant's subjective
6 symptom testimony. *Lingenfelter v. Astrue*, 504 F.3d 1028, 1035-36
7 (9th Cir. 2007); *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).
8 Under the first step, the ALJ must find the claimant has produced
9 objective medical evidence of an underlying "impairment," and that
10 the impairment, or combination of impairments, could reasonably be
11 expected to cause "some degree of the symptom." *Lingenfelter*, 504
12 F.3d at 1036. Once the first test is met, the ALJ must evaluate the
13 credibility of the claimant and make specific findings supported by
14 "clear and convincing" reasons. *Id.*

15 In addition to ordinary techniques of credibility evaluation,
16 the ALJ may consider the following factors when weighing the
17 claimant's credibility: the claimant's reputation for truthfulness;
18 inconsistencies either in his allegations of limitations or between
19 his statements and conduct; daily activities and work record; and
20 testimony from physicians and third parties concerning the nature,
21 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
22 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair*, 885 F.2d at 597
23 n.5.

24 _____
25 is to be given to the Commissioner's interpretation of the
26 Regulations. *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9th Cir. 2005);
27 *Bunnell v. Sullivan*, 947 F.2d 341, 346 n.3 (9th Cir. 1991).

1 The ALJ may also consider an unexplained failure to follow
2 treatment recommendations and testimony by the claimant "that
3 appears less than candid." *Tommasetti v. Astrue*, 533 F.3d 1035,
4 1039 (9th Cir. 2008). As explained by the Commissioner in his policy
5 ruling, the ALJ need not totally reject a claimant's statements; he
6 or she may find the claimant's statements about pain to be credible
7 to a certain degree, but discount statements based on his
8 interpretation of evidence in the record as a whole. SSR 96-7p.
9 The ALJ may find a claimant's abilities are affected by the symptoms
10 alleged, but "find only partially credible the individual's
11 statements as to the extent of the functional limitations." *Id.*

12 Although credibility determinations are the province of the
13 ALJ, and "the court may not engage in second-guessing," *Thomas*, 278
14 F.3d at 959, the court has imposed on the Commissioner a requirement
15 of specificity. *Connett v. Barnhart*, 340 F.3d 871, 873 (9th Cir.
16 2003); *Dodrill v. Shalala*, 12 F.3d 915, 917 (9th Cir. 1993). Even
17 if the record includes evidence to support a credibility
18 determination, the reasons must be articulated with specificity by
19 the ALJ in his decision. The court cannot infer lack of credibility
20 or affirm credibility findings "based on evidence the ALJ did not
21 discuss." *Connett*, 340 F.3d at 874. Further, the reviewing court
22 cannot make independent findings to support the ALJ's decision. *Id.*

23 Here, there is no affirmative evidence of malingering. In his
24 credibility findings, the ALJ found Plaintiff's medically
25 determinable impairments could be expected to produce symptoms
26 alleged by Plaintiff. (Tr. 23.) He specifically noted Plaintiff's
27 allegations of three heart attacks in 2001, weakness, numbness in
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1 his legs and arms, and prior treatment for depression (for which he
2 was no longer taking medication). (*Id.*) He also referenced
3 Plaintiff's activities of daily living, his alleged problems with
4 balance and limited exertional abilities. (*Id.*) In explaining his
5 reasons for finding Plaintiff's statements not entirely credible,
6 ALJ Say found no medical evidence to support the claim of heart
7 attacks (but noted the pain was "likely gastric, and not related to
8 his heart"), and the test results showing mild to moderate coronary
9 artery disease were "not enough to explain the claimant's complaints
10 of chest pains." (*Id.*) The ALJ also reasoned that Plaintiff's
11 reports of weakness and numbness during the closed period were not
12 supported by the evidence of "only mild degenerative disk disease of
13 the lumbar spine." (Tr. 23.)

14 As the Ninth Circuit has consistently ruled, where a medically
15 determinable impairment exists that could cause alleged symptoms, a
16 lack of medical evidence to substantiate the severity alleged is not
17 a sufficient reason to reject credibility. Other "clear and
18 convincing" reasons, and supporting evidence, must be identified.
19 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1036 (9th Cir. 2007)
20 (claimant's symptom testimony cannot be discredited merely because
21 severity alleged is unsupported by medical evidence); *Lester v.*
22 *Chater*, 81 F.3d 821, 834 (9th Cir. 1995); *Smolen*, 80 F.3d at 1280;
23 *Bunnell*, 947 F.2d at 345-46; *Cotton v. Bowen*, 799 F.2d 1403, 1407
24 (9th Cir. 1986).

25 Other reasons given by the ALJ do not cure this error. For
26 example, the ALJ's reference to an August 2007 medical examination
27 by Feyi Ward, M.D., in which the physician observed "normal
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1 strengths and gait," "no need of an assistive device" and "no
2 problem moving from sitting to standing," is not substantial
3 evidence to support the ALJ's reasoning in this case. (Tr. 415-21.)
4 Allegations discredited by the ALJ were those made by Plaintiff at
5 the hearing when he was describing symptoms he experienced between
6 2001 to 2005. (Tr. 527- 529.) Because Dr. Ward recorded her
7 observations in August of 2007, well after the alleged closed period
8 of disability, her report is not probative to the ALJ's credibility
9 determination.

10 The ALJ also found "claimant's allegedly disabling impairments
11 are still present at approximately the same level of severity as
12 they were prior to May 1, 2005 [when he returned to work as a truck
13 driver]." (Tr. 24.) ALJ Say then reasoned that this conclusory
14 finding "strongly suggests" Plaintiff's impairments would not have
15 prevented him from working during the closed period. (Tr. 24.)
16 However, the ALJ fails to support his reasoning with reference to
17 specific evidence in the record. Without further explanation based
18 on specific substantial evidence, this reasoning is not sufficiently
19 "clear and convincing" to assure that Plaintiff's statements were
20 not arbitrarily discredited. Finally, the ALJ's reasoning that
21 Plaintiff's report of daily activities "cannot be objectively
22 verified with any reasonable degree of certainty" (Tr. 24), imposes
23 a requirement on claimants that does not exist in the Commissioner's
24 regulations or Ninth Circuit case law.

25 The ALJ's credibility findings are not supported by the "clear
26 and convincing" reasons required by the court. *See Richardson*, 402
27 U.S. at 400; *Thomas*, 278 F.3d at 958-59; *Bunnell*, 947 F.2d at

1 345-46; *Fair*, 885 F.2d at 604. This is reversible error. *Orn v.*
2 *Astrue*, 495 F.3d 625, 640 (9th Cir. 2007). The ALJ's decision must
3 not only state what evidence he relies on in rejecting subjective
4 symptom testimony; he also must explain why it leads a reasonable
5 mind to reject the claimant's testimony. *Cooper v. Sullivan*, 880
6 F.2d 1152 (9th Cir. 1989). Although the record includes evidence
7 that might be a basis for a rejection of Plaintiff's pain and
8 symptom allegations, without the assertion of specific "clear and
9 convincing" reasons by the fact-finder, the court cannot affirm the
10 Commissioner's credibility determination. Where evidence exists in
11 the record that may be a basis for a credibility finding, but the
12 findings are not articulated by the ALJ, remand for additional
13 proceedings is the proper disposition. *Gonzalez v. Sullivan*, 914
14 F.2d 1197, 1202 (9th Cir. 1990).

15 **B. Lay Witness Evidence**

16 The ALJ gave little weight to statements submitted by
17 Plaintiff's daughter and ex-spouse. (Tr. 25.) Their statements are
18 considered "other source" opinions by the Regulations. 20 C.F.R.
19 §§ 404.1513(d)(4), 416.913(d)(4). Lay witness testimony as to a
20 claimant's symptoms or how an impairment affects ability to work is
21 competent evidence and must be considered by the ALJ. If lay
22 testimony is rejected, the ALJ "must give reasons that are germane
23 to each witness." *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9th Cir.
24 1996) (citing *Dodrill v. Shalala*, 12 F.3d 915, 919 (9th Cir. 1993)).

25 In a 2006 policy ruling, the Commissioner identified certain
26 factors that should be considered by the adjudicator in evaluating
27 opinions of non-medical other sources such as friends and relatives:

1 "the nature and extent of the relationship; whether the evidence is
2 consistent with other evidence; and other factors that tend to
3 support or refute the opinion." SSR 06-03p. Here, the ALJ first
4 reasoned the lay witnesses "cannot be considered disinterested" by
5 virtue of their relationship with Plaintiff. (Tr. 25.) While
6 standing alone this reason would be unhelpful, this is an
7 appropriate factor to consider provided there are other factors to
8 review. See *Bruce v. Astrue*, 557 F.3d 1113, 1116 (9th Cir. 2009).

9 However, the ALJ's other reason, *i.e.*, that the testimony was "not
10 consistent with the preponderance of objective evidence," is neither
11 germane nor specific. *Id.* The ALJ may not discredit lay testimony
12 regarding the severity of an impairment or how it affects the
13 ability to work because it is not corroborated by medical evidence
14 in the record. *Bruce*, 557 F.3d at 1116. On remand, the ALJ will re-
15 evaluate the lay witness testimony as directed by SSR 06-03p and
16 fully explain his conclusions.

17 **C. Medical Source Opinions**

18 In disability proceedings, the ALJ evaluates medical evidence
19 submitted and must explain the weight given to the opinions of
20 accepted medical sources in the record. The Regulations distinguish
21 among the opinions of three types of accepted medical sources: (1)
22 sources who have treated the claimant; (2) sources who have examined
23 the claimant; and (3) sources who have neither examined nor treated
24 the claimant, but express their opinion based upon a review of the
25 claimant's medical records. 20 C.F.R. §§ 404.1527, 416.927. A
26 treating physician's opinion carries more weight than an examining
27 physician's, and an examining physician's opinion carries more

1 weight than a non-examining reviewing or consulting physician's
2 opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004);
3 *Lester*, 81 F.3d at 830.

4 The ALJ must consider all medical evidence and must provide
5 "clear and convincing" reasons for rejecting the uncontradicted
6 opinion of a treating or examining physician." *Lester*, 81 F.3d at
7 830. If the medical opinion is contradicted, it can only be
8 rejected for specific and legitimate reasons that are supported by
9 substantial evidence in the record. *Andrews*, 53 F.3d at 1043. "The
10 ALJ can meet this burden by setting out a detailed and thorough
11 summary of the facts and conflicting clinical evidence, stating his
12 interpretation thereof, and making findings." *Magallanes v. Bowen*,
13 881 F.2d 747, 751 (9th Cir. 1989)(quoting *Cotton*, 799 F.2d at 1408).

14 On remand, the ALJ will re-evaluate the medical evidence,
15 taking into consideration the new credibility findings. Regarding
16 treating physicians A.B. Preacher, M.D., and Vivek Shah, M.D., from
17 the Providence Yakima Medical Center, the ALJ will discuss
18 thoroughly evidence submitted by these acceptable medical sources
19 and explain fully the weight given their clinic notes, observations,
20 test results and medical source statements. SSR 96-5p, 96-2p; (see
21 e.g., Tr. 281-304, 383-405.) Weight given other acceptable medical
22 sources in the record will also be fully explained. If treating or
23 examining medical source opinions are rejected, the ALJ will give
24 specific, legally sufficiently reasons for doing so.

25 CONCLUSION

26 The ALJ decision is based on legal error. Remand is necessary
27 for new credibility findings, re-consideration of lay testimony, and
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1 re-evaluation of medical evidence relevant to the closed period
2 alleged. Full consideration of the evidence may require a new
3 hearing with additional testimony from a vocational expert and/or
4 the Plaintiff and new step five findings. Accordingly,

5 **IT IS ORDERED:**

6 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 19**) is
7 **GRANTED;**

8 2. The case is **REVERSED AND REMANDED** to the Commissioner for
9 additional proceedings pursuant to sentence four of 42 U.S.C.
10 § 405(g) and consistent with this Order;

11 3. Defendant's Motion for Summary Judgment (**Ct. Rec. 25**) is
12 **DENIED.**

13 4. Application for attorney fees may be made by separate
14 motion.

15 The District Court Executive is directed to file this Order and
16 provide a copy to counsel for Plaintiff and Defendant. Judgment
17 shall be entered for **Plaintiff**, and the file shall be **CLOSED**.

18 DATED October 27, 2010.

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20 S/ CYNTHIA IMBROGNO
21 UNITED STATES MAGISTRATE JUDGE
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